Date: August 29, 1997

Case No.: 97-INA-63

In the Matter of:

ALBERTO'S MEXICAN RESTAURANT,
Employer

On Behalf Of:

NOEL MORENO-URIBE,
Alien

Appearance: Susan M. Jeannette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 4, 1994, Alberto's Mexican Restaurant ("Employer") filed an application for labor certification to enable Noel Moreno-Uribe ("Alien") to fill the position of Cook (AF 58-59). The job duties for the position are:

> Preparation of full range of Mexican menu items, such as carnitas, carne asada, machaca, burritos, tacos, tostadas, tamales, beans, rice, salsa, and guacamole. Use and knowledge of standard restaurant equipment, utensils and appliances. The rotating shift is because the restaurant is open 24 hours per day, and this gives everyone a chance for evenings and weekends of [sic] as per rotation. Must speak Spanish, as the owner is a newly legalized immigrant from Mexico to U.S. and [s]he speaks and understands only Spanish... all employees are Mexican, speaking and understanding only Spanish and safety instructions and directions must be understood, especially under the pressure of busy times.

The requirements for the position are six years of Grade School and two years of experience in the job offered or in a related occupation in a restaurant. Other Special Requirements are, "[m]ust be able to pass county health regulations for foodworkers." Item #17 on the ETA 750A form noted that the Alien will supervise two employees.

The CO issued a Notice of Findings on April 3, 1996 (AF 53-56), proposing to deny certification on the grounds that the Employer has failed to: (1) furnish lawful, job-related reasons for the rejection of U.S. applicant Guadalupe R. Yadira in violation of 20 C.F.R. § 656.24(b)(2)(ii); (2) have a *bona fide* job opening to which U.S. workers may be referred in violation of 20 C.F.R. § 656.3 and § 656.20(c)(8); and, (3) offer lawful terms and conditions of employment in violation of 20 C.F.R. § 656.7. The CO determined that by hiring U.S. applicant Yadira for another position, the Employer has acted unlawfully as this is a diversion of a qualified, available U.S. worker. Next, the CO found that the owner of the Employer is Miguel Vasquez, not San Juana Rodriguez; therefore, the CO is not persuaded as to ownership of the signatory for the location indicated. Additionally, since the Alien is apparently already working for the Employer for no pay, it is unlikely that the Employer would replace him with a U.S. worker who would require the prevailing wage. Lastly, the CO stated that the Alien is currently employed for the Employer without wages contrary to Federal and State employment tax regulations.

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Accordingly, the Employer was notified that it had until May 8, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 20, 1996 (AF 24-52), the Employer contended that about 14 days after she interviewed the qualified U.S. applicant, she had a position ready for her but has been unable to contact her as she has "vanished," and her roommate does not know how to get in touch with her. The Employer further stated that she was the sole owner of the Restaurant and that the Alien is not related to her in any way, nor is he a shareholder or officer. The Employer stated that Miguel Vasquez was the previous owner of the Restaurant, and she is not related to him, but that he was an independent restaurant owner with the Alberto's chain. Lastly, the Employer contended that the Alien has been on the payroll, which has been reported.

The CO issued the Final Determination on July 5, 1996 (AF 20-23). The CO denied certification because the Employer has failed to document that there is a *bona fide*, full-time job opportunity for a restaurant cook, in violation of 20 C.F.R. § 656.3.

On July 12, 1996, the Employer requested reconsideration and/or review of the Denial of Labor Certification (AF 2-19). The CO denied reconsideration on August 15, 1996 (AF 1), and in November 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on December 20, 1996.

On March 14, 1997, BALCA issued an Order allowing the Employer 30 days to submit a statement as to whether it still wishes to pursue this appeal and, if so, to submit a current address for the Alien. There has been no response to date.

Discussion

An employer seeking labor certification must prove that a *bona fide* job opportunity exists. The requirement of a *bona fide* job opportunity arises out of § 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker."

In this case, the CO, in the NOF, found that the Employer failed to show that a *bona fide* job opportunity exists (AF 55). As such, the CO requested that the Employer submit proof of ownership, as well as the California Form 3DP and/or Internal Revenue Service form 941 showing employees for the location in question.

In response, the Employer stated that she is the President/Treasurer of Molcarla, Inc., which was formed in 1995 (AF 25). She further stated that, "before that time, this restaurant was owned by me and no one else as a sole proprietorship." The Employer also indicated that the restaurant in question is part of her corporation. In support of this contention, the Employer submitted a statement from a legal assistant indicating that his office represents Molcarla Corporation, of which the Employer is the President/Treasurer (AF 27). Finally, the Employer submitted several DE6 Quarterly Wage Reports (AF 39-52).

We find that the Employer has failed to establish that a *bona fide* job opportunity exists. First, the Employer did not submit proof that she owns the restaurant in question as requested by the CO. In response to the CO's specific request, the Employer has offered only her own assertions without any supporting documentation (AF 25).[2] Although a written assertion constitutes documentation that must be considered under *Gencorp*, 87-INA-659, (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Moreover, we agree with the CO in that the DE6 wage reports submitted by the Employer do not indicate the address of the corresponding Alberto's Restaurant (AF 34-52). In light of the fact that the Employer has not established that she owns the restaurant in question, this documentation does not support a finding that a *bona fide* job opportunity exists. Accordingly, the CO's denial of certification is hereby AFFIRMED.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

[2]The statement by the Employer's legal assistant does not support a finding that she currently owns the restaurant in question (AF 27).

[3]We note that the Employer submitted additional documentation in conjunction with her request for review. However, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 20, 1991). The CO clearly requested specific information in the NOF. Therefore, the Employer had every opportunity to respond in its rebuttal.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.